Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

WINSTAR CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
PAUL BENDER
Deputy Solicitor General
JAMES A. FELDMAN
Assistant to the Solicitor General
DOUGLAS LETTER
JACOB M. LEWIS
SCOTT R. MCINTOSH
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the doctrine that a contract will be interpreted to cede government regulatory authority only if it does so in unmistakable terms is applicable in a breach of contract action where the plaintiff seeks money damages but not injunctive relief.

2. Whether, absent a specific congressional authorization to do so, a federal agency may bind itself and its successors by contract to exercise governmental regulatory authority in a particular way, regardless of subsequent legislative changes.

3. Whether provisions of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, limiting the ability of thrift institutions to use intangible assets to satisfy minimum capitalization requirements were "public and general acts," for purposes of the sovereign acts doctrine.

PARTIES TO THE PROCEEDING

Aside from the parties named in the caption, United Federal Savings Bank, Statesman Savings Holding Corp., The Statesman Group, Inc., American Life and Casualty Company, and Glendale Federal Bank, F.S.B., were parties in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The en banc opinion of the court of appeals (App. 1a-52a) is reported at 64 F.3d 1531. The panel opinion of the court of appeals (App. 53a-105a) is reported at 994 F.2d 797. The opinions of the Court of Federal Claims (App. 106a-152a, 153a-180a, 181a-182a, 183a-195a) are reported at 21 Cl. Ct. 112, 25 Cl. Ct. 147, 25 Cl. Ct. 541, and 26 Cl. Ct. 904.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1995. On November 22, 1995, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including December 6, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, are set forth in the Appendix to this petition. App. 196a-204a.

STATEMENT

This petition concerns three separate cases that were consolidated for appeal before the Federal Circuit. The circumstances of the three cases vary somewhat, but they involve a common factual background and similar legal issues.

1. Savings and loan institutions or "thrifts" have been the subject of pervasive federal support, supervision, and regulation since the 1930s. See *Fahey* v. *Mallonee*, 332 U.S. 245, 250 (1947) ("[b]anking is one of the longest regulated and most closely supervised of public callings"). The modern thrift industry is now "a federally-conceived and assisted system to provide citizens with affordable housing funds." H.R. Rep. No. 54, 101st Cong., 1st Sess. Pt. 1, at 292 (1989) (*House Report*).

In the late 1970s and early 1980s, high interest rates and inflation resulted in a substantial increase in the cost of attracting deposits for thrifts. At the same time, many thrifts held long-term, low-yielding fixed rate mortgages. This "negative interest rate

mismatch" precipitated a major crisis in the thrift industry. See *House Report* at 294-295. Many thrifts were left with severely depleted capital or negative net worth. Their frequent response was "that the easiest way to regain profitability and generate adequate levels of new capital, was to grow rapidly," thus increasing the size of their loan portfolio and putting more of their depositors' money at risk. *House Report* at 298-299; S. Rep. No. 19, 101st Cong., 1st Sess. 9 (1989). The result was a record number of failures of thrift institutions and a loss of public confidence that threatened to engulf the entire industry.

2. FIRREA was enacted in 1989 to prevent the collapse of the thrift industry and to restore it to economic health. This statutory scheme has provided well over $100 billion in taxpayer money to close insolvent institutions and recapitalize the federal insurance fund protecting thrift deposits.

FIRREA modified the overall federal thrift regulatory scheme by: (1) abolishing the Federal Savings and Loan Insurance Corporation (FSLIC) and transferring its functions to other agencies; (2) creating a new thrift deposit insurance fund under the Federal Deposit Insurance Corporation (FDIC); (3) eliminating the Federal Home Loan Bank Board (the Bank Board) and replacing it with the Office of Thrift Supervision (OTS)—an office within the Department of the Treasury—and making the OTS Director responsible for regulation of all federally insured savings associations and chartering of federal thrifts; and (4) establishing the Resolution Trust Corporation (RTC), charged with resolving certain closed thrifts. See 12 U.S.C. 1437 note, 1441a, and 1821.

At the "heart" of this legislative reform (135 Cong. Rec. 18,863 (1989) (Sen. Riegle)) was the requirement that OTS "prescribe and maintain uniformly applicable capital standards for savings associations," subject to strict statutory constraints. 12 U.S.C. 1464(t)(1)(A). The federal regulatory scheme had long imposed certain capital requirements on federally insured institutions, including both requirements of minimal capitalization and restrictions on what could be counted as capital in determining whether those requirements were satisfied.[1] FIRREA prescribed three strict new minimum capital requirements that thrifts must satisfy. See 12 U.S.C. 1464(t)(2) (requirements for "core capital," "tangible capital," and "risk-based capital"), *reprinted at* App. 196a-198a. The new strengthened capital requirements were considered crucial to prevent a recurrence of the thrift crisis since, in Congress's view, "[t]o a considerable extent, the size of the thrift crisis resulted from the utilization of capital gimmicks that masked the inadequate capitalization of thrifts." *House Report* at 310.

From 1981 until the enactment of FIRREA, the Bank Board had permitted thrifts to use "goodwill"

[1] Those requirements have been the subject of numerous statutory and regulatory changes over the years. See, *e.g.*, Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469; Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132; Emergency Home Finance Act of 1970, Pub. L. No. 91-351, 84 Stat. 450. In 1982 alone the regulations governing thrift capital reserve requirements changed three times. See 47 Fed. Reg. 3543 (1982); *id.* at 31,859; *id.* at 52,961. See also 45 Fed. Reg. 72,681 (1980) (Bank Board proposal to change regulatory treatment of goodwill).

to satisfy federal regulatory capital requirements. Goodwill is an intangible "asset" that, under Generally Accepted Accounting Principles (GAAP), equals the amount by which the cost of an acquisition (including all liabilities assumed by the acquirer) exceeds the fair market value of the acquired tangible assets. In the context of a supervisory merger, when such goodwill existed, it was known as "supervisory goodwill." Thus, the surviving thrift could declare as an asset the merged thrift's net worth deficit.

Another type of intangible asset involved in this case is Regulatory Accounting Practices goodwill, or "capital credits." The Bank Board often allowed double counting of funds that FSLIC contributed to merging thrifts, permitting such funds to be counted both as cash and again as goodwill for purposes of meeting regulatory requirements. See *Security Savings & Loan* v. *Director, OTS*, 960 F.2d 1318, 1320 n.5 (5th Cir. 1992); *Transohio Savings Bank* v. *Director, OTS*, 967 F.2d 598, 604 (D.C. Cir. 1992).

To strengthen the financial soundness of federally insured thrifts, FIRREA severely restricted the ability of thrifts to use intangible assets like supervisory goodwill or capital credits to meet the statute's three new minimum capital requirements. 12 U.S.C. 1464(t)(1)(A), 1464(t)(2) and (3); 1464(t)(9); 12 C.F.R. 567.2, 567.5. As Congress recognized, "[g]oodwill is not cash. It is a concept, and a shadowy one at that. When the Federal Government liquidates a failed thrift, goodwill is simply no good. It is valueless. That means, quite simply, that the taxpayer picks up the tab for the shortfall." 135 Cong. Rec. 11,795 (1989).

Although it places limits on the use of intangible assets to meet federal capital requirements, FIRREA

does not eliminate such use altogether. FIRREA initially allowed some supervisory goodwill to be used for meeting some federal capital requirements, and it also permits goodwill to be counted for the purpose of determining the extent to which thrifts may make certain types of loans and investments. See, *e.g.*, 12 U.S.C. 1464(c)(2)(A), 1464(t)(3). Although limited discretion was given to OTS, the statute itself set forth most of the restrictions on the use of intangible assets like goodwill. See *Carteret Savings Bank* v. *OTS*, 963 F.2d 567, 574-582 (3d Cir. 1992).

3. Respondents are the owners of two now-defunct thrift institutions (United Federal Savings Bank, which was owned by plaintiff Winstar Corporation, and Statesman Bank for Savings, which was owned by plaintiff Statesman Savings Holding Corp.), and one currently operating thrift, Glendale Federal Bank, FSB, which were involved in mergers or acquisitions of thrifts prior to 1989. Following enactment of FIRREA, respondents filed three separate actions against the United States in the Court of Federal Claims, seeking monetary relief for asserted breach of contract or frustration of purpose caused by FIRREA, or just compensation for a claimed taking of constitutionally protected property rights. The contract and property right that respondents claim is the right to treat supervisory goodwill as capital for purposes of satisfying federal capital requirements for periods of 25 to 40 years and, in the case of Statesman, to treat capital credits as capital indefinitely.

Respondents based their contract claims primarily on agreements that they signed with the FSLIC, and on regulatory resolutions and letters issued by the Bank Board governing transactions in which

goodwill was created. The material facts in each of the three cases differ to some extent, but they raise the same pivotal legal issues.

Each of the three cases involves either a merger or an acquisition under which one thrift voluntarily merged with or took over one or more failing thrifts in 1981 (Glendale), 1983 (Winstar), and 1987 (Statesman). App. 8a, 9a, 11a. In each instance, the thrifts needed the regulatory approval of the Bank Board for the merger or acquisition. In each instance, the thrift and the FSLIC also entered into an agreement setting the terms of the transaction, as well as the terms of actual or potential government assistance.[2] In all three instances, those contracts provided that "[n]othing in this Agreement shall require any unlawful action or inaction" by the parties. App. 82a.

In each of the three transactions, goodwill was created. In each case, the Bank Board issued "forbearance letters" under which the agency stated that it would forbear in certain circumstances from bringing enforcement proceedings against the thrifts for failing to satisfy regulatory capital requirements following the merger or acquisition. The Bank Board also issued resolutions permitting each thrift to use GAAP principles, under which substantial amounts of goodwill would be amortized over lengthy periods: *Glendale* involved $716 million to be amortized by the thrift over 40 years, App. 9a, *Winstar* involved $9.1 million to be amortized by the thrift over 35 years, App. 28a, 171a, and *Statesman* involved $25.8 million in goodwill to be amortized over 25 years, App. 10a. In

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[2] In *Winstar*, the government contributed over $5.5 million to the transaction, App. 194a. In *Statesman*, the government contributed $60 million, App. 10a.

addition, the supervisory assistance agreement between FSLIC and Statesman expressly permitted Statesman to count $26 million of the federal cash contribution as a "capital credit" that "[f]or purposes of reports to the Bank Board * * * shall be credited to [Statesman's] regulatory capital account and shall constitute regulatory capital." C.A. App. 803.

Under FIRREA's stringent new regulations limiting the use of intangible assets to meet the new regulatory capital requirements, none of the intangible assets created in any of the three transactions could continue to be counted as capital. The Winstar and Statesman thrifts, like many other thrifts at the time, were unable to meet the new capitalization requirements, and were placed in receivership; they no longer exist. Glendale raised the necessary new capital in private markets and is today an operating thrift. App. 14a.

4. In each of these three cases, the Court of Federal Claims held that the subject thrift had a contract with the government guaranteeing favorable long-term regulatory treatment of goodwill, and that Congress through FIRREA breached that contract by restricting the use of existing goodwill to meet the new capitalization mandates.

In *Winstar*, the trial court held that the thrift had an implied-in-fact contract with the government concerning treatment of goodwill. App. 187a. The court rejected the government's argument that the thrift's claims were defeated by the "unmistakability doctrine" derived from this Court's decision in *Bowen* v. *Public Agencies Opposed to Social Security Entrapment* (*POSSE*), 477 U.S. 41, 52-53 (1986), and other cases. That doctrine provides that a contract will not be construed to waive sovereign

regulatory authority unless the intent to do so is expressed by the contract in unmistakable terms. App. 157a-170a. The court concluded that FIRREA had breached the implied contract by restricting use of goodwill for regulatory capitalization purposes. App. 171a-172a.

The trial court also rejected the government's argument that there could be no liability for breach of contract in any event because of the "sovereign acts" doctrine, which precludes breach of contract actions against the government where the government's inability to perform is the result of a "public and general act" of the Congress. The court found this doctrine inapplicable because, in the court's view, FIRREA was not a "public and general act" insofar as it abrogated the contracts of a particular class of entities that had contracted to use supervisory goodwill to satisfy federal capital requirements. App. 173a-179a. The court announced that, in subsequent proceedings, it would determine the amount of the injuries, if any, and the appropriate measure of damages. App. 180a.

The trial court relied on its *Winstar* rulings regarding the unmistakability and sovereign acts doctrines in its subsequent rulings in *Statesman* and *Glendale*. The court held that the thrifts in those cases had express contracts with the government concerning regulatory treatment of goodwill. App. 120a-125a. The court rejected the government's argument that the contracts themselves contained clauses making clear that they were subject to changes in the regulatory scheme. App. 125a-132a. The court concluded that the contracts covering Statesman and Glendale had been breached by FIRREA. It consolidated the two cases, combined

them with *Winstar*, and certified its order for immediate interlocutory appeal. App. 150a-152a.

5. The Federal Circuit accepted the consolidated cases for interlocutory appeal, and a divided panel of the court reversed the decision of the Court of Federal Claims. The panel held that the plaintiffs had failed to meet the high standard for showing that their contracts contained terms guaranteeing them a specified form of favorable regulatory treatment for lengthy periods stretching well into the next century. App. 53a-105a. The Federal Circuit then granted respondents' petitions for rehearing en banc. After rebriefing and reargument before the full court, the court reversed the panel decision and affirmed the trial court's ruling on contract breach liability. App. 1a-46a.

The Federal Circuit held that the express contracts into which FSLIC had entered with all three thrifts included promises that all three could count supervisory goodwill (and Statesman could count capital credits as well) as capital for purposes of satisfying federal capital requirements. App. 17a-29a. As noted above, pp. 7-8, *supra*, Statesman's supervisory assistance agreement (SAA) expressly permitted it to use $26 million of capital credits to satisfy federal capital requirements. App. 24a. None of the SAAs, however, contained express provisions permitting supervisory goodwill to be similarly used. The court held that each thrift's "contract was not limited to the SAA itself, but also included the contemporaneous resolutions and letters issued by the FSLIC and the Bank Board." App. 17a (Glendale); see App. 25a (Statesman), 27a (Winstar). In each case, the court found in those documents the crucial term promising that supervisory goodwill could be counted

for the next 40 years (Glendale), 25 years (Statesman), or 35 years (Winstar) to satisfy regulatory capital requirements. App. 18a-22a (Glendale); 25a-26a (Statesman); 28a (Winstar).[3] The court also found that the FSLIC and Bank Board had the authority to enter into contracts containing those terms. App. 39a.

The Federal Circuit held that the unmistakability doctrine—pursuant to which contractual promises by the government to exercise its regulatory authority in a certain way will be found only if expressed in unmistakable terms—has no application in this case. App. 31a-38a. The Federal Circuit agreed with the trial court that the unmistakability doctrine applies only where plaintiffs are seeking to hold the government to an alleged bargain by seeking injunctive relief, and not where, as here, plaintiffs are only seeking contract damages. App. 31a-38a. The Federal

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[3] For example, in *Glendale*, the court relied on a Bank Board resolution requiring Glendale to furnish an accountant's opinion that "(a) indicates the justification under [GAAP] for the use of the purchase method of accounting for its merger with Broward, (b) specifically describes * * * any goodwill or discount of assets arising from the merger to be recorded on Glendale's books, and (c) substantiates the reasonableness of amounts attributed to goodwill and the discount of assets and the resulting amortization periods and methods." App. 18a-19a. The resolution also required Glendale to "submit a stipulation that any goodwill arising from this transaction shall be determined and amortized in accordance with" a Bank Board memorandum providing that "[a]n application * * * requesting approval for a business combination to be accounted for by the purchase method of accounting, from which intangible assets will result, should include a description of any resulting intangible assets and the plan for their amortization." App. 19a & n.4.

Circuit also ruled that the sovereign acts doctrine is inapplicable in these cases. In the court's view, FIRREA cannot be said to be a "public and general act" because it "singles out supervisory goodwill for special treatment, albeit treatment less harsh than other forms of intangible assets." App. 42a.

Judge Nies dissented, essentially for the reasons given in her prior opinion for the panel. App. 47a-48a. In her view, "no clause can be found in the contracts under which the Bank Board and the FSLIC promised to pay if Congress decided to step in and do away with the 'purchase method of accounting,' a euphemism for spinning straw into gold, and other accounting gimmicks." App. 48a. Therefore, "[i]n this highly regulated industry, the thrifts did not negotiate contracts that freed them from the risk of a change in regulations." App. 48a. She also stated that the majority's approach "impermissibly fuses 'the two characters which the government possesses as a contractor and as a sovereign.'" App. 47a (quoting *Horowitz* v. *United States*, 267 U.S. 458, 461 (1925)). In her view, the thrifts' sole possible remedy at this point was to seek compensation for a taking, and she believed that the matter should be remanded to the trial court for a determination of whether a taking had occurred. App. 47a.

Judge Lourie also dissented. He believed that "the sovereign acts doctrine is a barrier to the thrifts' recovery under a breach of contract theory." App. 49a. In his view, FIRREA was a public and general act because "Congress did not act only against certain thrifts or contracts; it acted to deal with the entire thrift system in order to save it." App. 50a-51a. Judge Lourie relied on this Court's holding in *Horowitz* that "the United States when sued as a

contractor cannot be held liable for an obstruction to the performance of [a] particular contract resulting from its public and general acts as a sovereign." App. 49a (quoting *Horowitz*, 267 U.S. at 461).

REASONS FOR GRANTING THE PETITION

The en banc decision by the Federal Circuit regarding the application of the unmistakability doctrine is in conflict with rulings of other circuits as well as with this Court's application of the doctrine. The court's decision also incorrectly resolves important questions concerning the authority of executive branch officials to commit the government to refrain from future exercises of sovereign regulatory authority, and it misconceives the scope of the sovereign acts doctrine. The decision may, in addition, have an enormous fiscal impact upon the federal government. It directly affects over 90 cases that are pending in the Court of Federal Claims and have been stayed awaiting a ruling in this case. The issues raised are also present in cases pending in the Ninth Circuit and in several district courts. The pending cases involve a total of approximately $10 billion in goodwill. The decision below also establishes precedent in the Federal Circuit, which could affect a wide range of government contract cases outside the thrift context. Review by this Court is therefore warranted.

1. a. The alleged contractual terms on which respondents rest their claims of breach in this case would have committed the government to exercise its regulatory authority in a particular way over a period of between 25 and 40 years (or forever, in the case of Statesman's capital credits). Under respondents' theory, those terms would have to be construed to

have bargained away the discretion of the then-existing federal regulatory authorities under the then-existing statutory scheme to interpret and enforce then-existing capital requirements. They would also have to be construed to have bargained away Congress's right to change the law—as it did in FIRREA—to overhaul federal regulation of thrift institutions by strengthening capital requirements. The alleged contractual terms thus fall squarely within the unmistakability principle articulated by this Court in *Bowen* v. *Public Agencies Opposed to Social Security Entrapment* (*POSSE*), 477 U.S. 41, 52-53 (1986); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982), and *United States* v. *Cherokee Nation*, 480 U.S. 700, 707 (1987).

In *POSSE*, the Court held that States that entered into contracts with the federal government that gave them the right to withdraw their employees from the social security system had not obtained the right to enforce those provisions when subsequent legislation made withdrawal of state employees illegal. The Court relied on the principle that "courts should be extremely reluctant to construe [agreements] in a manner that forecloses Congress' exercise of [its sovereign] authority." 477 U.S. at 52. The Court concluded that "contractual arrangements, including those to which a sovereign itself is party, 'remain subject to subsequent legislation' by the sovereign." *Ibid.*

In *POSSE*, the Court referred to its decision in *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982), for the governing legal principles. See 477 U.S. at 52. *Merrion* involved an Indian Tribe's claim to the right to impose a severance tax on oil and gas production on Reservation land. The Tribe had

previously negotiated leases with the oil and gas producers that included royalty payments to the Tribe. The Court held that, absent an unmistakable surrender of its sovereign right to impose a tax, the Tribe's action in negotiating the royalty payments should not be construed as a surrender of that right. The Court stated that "sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." 455 U.S. at 148.

In *United States* v. *Cherokee Nation*, 480 U.S. 700, 707 (1987), the Court invoked the unmistakability doctrine to find that a federal agreement to cede fee simple title to a riverbed to an Indian Tribe should not be construed to have surrendered the federal navigational servitude. Citing *POSSE*, the Court stated that a waiver of "sovereign authority will not be implied but instead must be surrendered in unmistakable terms." *Ibid.* (quoting *POSSE*, 477 U.S. at 52).

b. The Federal Circuit expressly declined to apply the unmistakability doctrine in this case. In doing so, the court of appeals did not question the proposition that the claimed contractual terms involved the exercise by the government of its sovereign regulatory authority. Instead, the court relied on the fact that "[t]he thrifts did not ask for * * * injunctive relief that would have enjoined the thrift regulators from applying the FIRREA requirements to the thrifts" and "[m]oney damages, in contrast to injunctive relief, presents little threat to the government's sovereign powers." App. 37a.

This ruling by the Federal Circuit conflicts with this Court's consistent treatment of the unmis-

takability doctrine as a principle governing contract *interpretation*, not contract *relief*. The Court has never suggested that a plaintiff may recover on a claim that the government failed to honor an implied contractual term regarding the exercise of its sovereign regulatory authority, so long as the plaintiff seeks only monetary relief. Indeed, in *Cherokee Nation*, the plaintiffs did not seek injunctive relief, but instead sought "compensation [under the Takings Clause] for damage to the[] riverbed interests" that they alleged had been damaged. 480 S. at 701. Notwithstanding that monetary claim, the Court applied the doctrine that "a waiver of sovereign authority will not be implied, but instead must be 'surrendered in unmistakable terms.'" 480 U.S. at 707 (quoting *POSSE*, 477 U.S. at 52).

The Federal Circuit's ruling also conflicts with the decision of the Fourth Circuit in *Charter Federal Savings Bank* v. *OTS*, 976 F.2d 203 (4th Cir. 1992), cert. denied, 113 S. Ct. 1643 (1993). *Charter Federal* involved claims regarding treatment of goodwill that are virtually identical to the claims in the cases at bar. The plaintiff thrift in *Charter Federal* sought "a declaratory judgment concerning its contractual rights" that the parties understood could "later serve[] as a basis for money damages." 976 F.2d at 209-210. The court rejected plaintiff's claims by applying the unmistakability doctrine. The court held that, "[w]here the federal government is a party to a contract, courts should apply a[] * * * special rule of contract construction." 976 F.2d at 211. Citing this Court's decision in *POSSE*, the court observed that the "FHLBB approved [the thrift's] use of supervisory goodwill under its then statutory discretion to permit such accounting practices, but

made no explicit promise to [the thrift] of continued approval throughout the life of the amortization period." 976 F.2d at 212. "Without a more explicit promise, we will not enlarge the scope of guarantees given to Charter." *Ibid.*[4]

Had the court of appeals applied the unmistakability doctrine, it could not have reached the result it did. The strongest argument in these cases for finding an unmistakable contractual commitment not to employ the sovereign power of the federal government was presented by the provision in Statesman's contract with the FSLIC that expressly provided that Statesman could treat its capital credit as an asset to

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[4] The courts of appeals have similarly applied the unmistakability doctrine as a principle of contract interpretation in actions for injunctive relief arising in a factual setting similar to that in these cases. In *Guaranty Financial Services, Inc.* v. *Ryan*, 928 F.2d 994, 1000-1001 (11th Cir. 1991), the Eleventh Circuit held that courts in such cases must apply the rule of construction "that one who wishes to obtain a contractual right against the sovereign that is immune from the effect of future changes in law must make sure that the contract confers such a right in unmistakable terms." See also *Carteret*, 963 F.2d at 574 (noting relevance of unmistakability doctrine to thrift claims of contract rights the same as those raised here). Although the D.C. Circuit has suggested that it is possible that there is a distinction between actions for injunctive and for monetary relief, see *Transcapital Financial Corp.* v. *Director, OTS*, 44 F.3d 1023, 1025-1026 (D.C. Cir. 1995), that court has also denied contractual claims for injunctive relief in a situation virtually identical to those involved in these cases. See *Transohio Savings Bank* v. *Director, OTS*, 967 F.2d 598 (D.C. Cir. 1992). By contrast, although not mentioned by the Federal Circuit, the Tenth Circuit has also found the unmistakability doctrine inapplicable outside the injunctive context. *RTC* v. *FSLIC*, 34 F.3d 982 (10th Cir. 1994).

satisfy federal capital requirements. See pp. 7-8, *supra*. That contract, however, was subject to three provisions that clearly provide that any term in the contract could be vitiated by subsequent legislation. These provisions required Statesman to comply with all statutes, regulations, and orders of the United States regarding the conduct of Statesman's business, provided that nothing in the agreement would require any unlawful action by either party, and stated that, if any provision in the agreement were to be invalid or unenforceable, the remaining provisions would still have full force and effect. App. 126a; C.A. App. 853, 854, 855.

The claims of all three thrifts regarding supervisory goodwill rest on far weaker footing. Indeed, the express commitment that Statesman obtained regarding treatment of its capital credit highlights the failure of any of the three thrifts to obtain a like commitment regarding the use of supervisory goodwill to satisfy capital requirements. Nowhere in any of the three cases did the contracts—even if construed to include Bank Board resolutions and letters[5]—mention the use of supervisory goodwill to

[5] Bank Board resolutions were not contract documents; they were regulatory agency decisions issued in informal agency adjudications approving applications by thrifts to consummate mergers that could not have been completed without first obtaining regulatory approval (see, *e.g.*, 12 U.S.C. 1464 (1988)). See *Charter*, 976 F.2d at 211 ("resolutions issued by the [Bank Board] in connection with the mergers merely granted that agency's approval of the merger and the accounting practices employed by [the thrift] in connection therewith," and did not constitute a contract); *Flagship Federal Savings Bank* v. *Wall*, 748 F. Supp. 742, 748 (S.D. Cal. 1990) ("the forbearance letter was not a contract but a statement by the [Bank Board] that it would not prosecute"). Cf. *National Railroad Passenger Corp.* v. *Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 465-469 (1985) (no contractual rights had been created when repealed statutory provision had merely stated a regulatory policy).

meet federal capital requirements, much less grant the thrifts permission to use supervisory goodwill for that purpose for many years, regardless of changes in the governing statutes and a thorough overhaul of the regulatory system.

2. Even if the Federal Circuit's failure to apply the unmistakability doctrine were correct, the Federal Circuit's conclusion that the then-existing thrift regulators had the authority to enter into contracts binding the government not to apply new statutory capital requirements conflicts with fundamental principles governing the exercise of legislative power and its delegation. The Federal Circuit construed the contracts to include a promise that the federal government would continue to permit supervisory goodwill and capital credits to be counted as capital for purposes of federal thrift capitalization requirements. The court construed that promise to extend for periods of up to 40 years into the future, regardless of any change in the law. It is doubtful whether any such commitment by regulators concerning the exercise of federal regulatory authority could bind the legislative branch of the federal government. Certainly such a delegation should not be found to exist absent the most explicit grant of authority by Congress to enter into such arrangements.

More than a century ago, this Court held that there can be no contract right to a regulatory scheme, regardless of a party's expectations to the contrary. See *Welch* v. *Cook*, 97 U.S. 541, 542 (1878); *Wisconsin & Michigan Ry.* v. *Powers*, 191 U.S. 379, 386-387

(1903). "[G]overnmental [regulatory] powers cannot be contracted away." *North American Commercial Co.* v. *United States*, 171 U.S. 110, 137 (1898); *Northern Pacific Ry.* v. *Minnesota*, 208 U.S. 583, 598 (1908); *City of El Paso* v. *Simmons*, 379 U.S. 497, 508-509 (1965); *Amino Brothers Co.* v. *United States*, 372 F.2d 485, 491 (Ct. Cl.), cert. denied, 389 U.S. 846 (1967).[6] Because "the legislature cannot bargain away the police power of a State," *Stone* v. *Mississippi*, 101 U.S. 814, 817 (1880), this Court has consistently ruled that the Contract Clause in the Constitution does not require governments "to adhere to a contract that surrenders an essential attribute of its sovereignty." *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 23 (1977). To hold otherwise would impermissibly permit legislators or unelected federal regulatory officials to use contracts with private individuals to commit subsequent legislatures not to take actions that are in the public interest. See *United States Trust*, 431 U.S. at 45 (Brennan, J., dissenting). See also *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 434-444 (1934).

The Federal Circuit in this case nevertheless held that "the Bank Board and the FSLIC, as the principal regulators of the thrift industry, were fully empowered to enter into the contracts at issue here." App. 39a. In support of that holding, the court cited only the general provision in FSLIC's statutory charter granting it authority "[t]o make contracts,"

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[6] In *Veix* v. *Sixth Ward Building & Loan Ass'n*, 310 U.S. 32 (1940), the Court rejected a Contract Clause challenge to a state statute altering the scheme of regulation of a thrift. The Court held that the regulations governing the thrift had always remained "subject to the paramount police power." *Id.* at 38.

and other general provisions permitting FSLIC and the Bank Board "to extend assistance to acquirers of insolvent FSLIC-insured thrifts * * * and to set minimum capital limits on a case-by-case basis." App. 39a. Those provisions establish that FSLIC had authority to enter into assistance agreements. They may also establish that the then-existing regulatory agencies had the authority to grant capital forbearances.[7] The cited provisions do not, however, provide even a hint that Congress intended to grant FSLIC or the Bank Board the authority to commit Congress not to modify the governing statutes.[8] Nor do they suggest that FSLIC or the Bank Board had the authority to commit successor agencies operating under a new set of statutory requirements to permit thrifts to calculate their capital in a way that Congress had made illegal.[9] Compare *OPM* v.

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[7] The FSLIC could not grant financial assistance to thrifts if the amount of assistance would be greater than the cost of liquidating the institution. See 12 U.S.C. 1729(f)(4)(A) (1988) (now repealed). In light of that provision, it is highly unlikely that the FSLIC had authority to enter binding contracts whereby the United States would assume a risk, if Congress later changed thrift capitalization rules, of having to pay contract breach damages that would exceed the cost of closing the thrift.

[8] To the contrary, as the D.C. Circuit noted, "the Bank Board statute, like the law in *POSSE*, contains an express reservation of '[t]he right to alter, amend or repeal this chapter." *Transohio Savings*, 967 F.2d at 623, quoting Section 30 of the Federal Home Loan Bank Act, ch. 522, 47 Stat. 741 (1932).

[9] Respondents were on notice that Congress could at any point affect their agreements by changing the regulatory scheme, as it had done so many times in the past. See note 1, *supra*; *Carteret*, 963 F.2d at 581 (noting the "massively

Richmond, 496 U.S. 414 (1990); *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 383-384 (1947).

3. The Federal Circuit also erred in finding the "sovereign acts" doctrine inapplicable here. Under that doctrine, parties to a contract are immune from liability for breach of contract when the government has acted in its sovereign capacity, regardless of whether such actions infringe existing contractual rights or create additional monetary burdens on private parties who have contracted with the government. See *Horowitz* v. *United States*, 267 U.S. 458, 461 (1925).

Thus, the United States is not liable on contract damage theories if the act that precluded the government's performance was "public and general," and not taken merely to avoid obligations to a particular party. See *Deming* v. *United States*, 1 Ct. Cl. 190, 191 (1865), appeal dismissed, 76 U.S. 145 (1870). See, *e.g.*, *Atlas Corp.* v. *United States*, 895 F.2d 745, 754-755 (Fed. Cir.), cert. denied, 498 U.S. 811 (1990); *Tony Downs Foods Co.* v. *United States*, 530 F.2d 367 (Ct. Cl. 1976); *Amino Brothers Co.*, 372 F.2d at 491. FIRREA is a "public and general" statute for these purposes; it was a comprehensive overhaul of the regulation of an entire industry for the protection of depositors nationwide in order to benefit the general welfare. The provisions of FIRREA imposing capital requirements did not merely affect thrifts that had

regulated banking industry, where the rules of the game change with some regularity"); *Charter Federal*, 976 F.2d at 212 (explaining that since "[c]apital requirements have been an evolving part of the regulatory scheme since its inception," the Bank Board "would have expected changes in statutory requirements, including capital requirements").

allegedly obtained commitments from the regulatory agencies to permit them to count supervisory goodwill or capital credits as capital. They sharply curtailed the ability of any thrift to count intangible assets as capital, regardless of whether those assets had ever been at issue in any arrangement with federal regulators. The pivotal question in determining whether a legislative action is a "public and general act" under the sovereign acts doctrine is not whether a particular party is affected by the governmental action at issue; it is whether the effect on a particular party or parties is an incidental effect of a new law enacted to govern government regulatory policy generally and to advance the general welfare.[10]

The Federal Circuit concluded that the sovereign acts doctrine is inapplicable here because "the relevant sections of FIRREA are not public and general sovereign acts." App. 39a. In the court's view, that conclusion followed from certain provisions of FIRREA that specifically refer to thrifts in respondents' position and that therefore amount to legislation that is not "public and general" but whose "principal effect is to abrogate specific contractual rights." App. 40a.

The FIRREA "transition rule[s]," App. 42a, to which the court of appeals referred make limited

[10] Application of the sovereign acts doctrine here is consistent with this Court's rulings in *Lynch* v. *United States*, 292 U.S. 571 (1934), and *Perry* v. *United States*, 294 U.S. 330 (1935). As this Court stated in *POSSE*, those "decisions * * * held that Congress does not have the power to repudiate its own debts, which constitute 'property' to the lender, *simply in order to save money*." *POSSE*, 477 U.S. at 55 (emphasis added).

exceptions to some of FIRREA's restrictions on the use of goodwill for thrifts in respondents' position. As the Federal Circuit conceded, the rules therefore undeniably placed respondents in a *better* position than other thrifts and in a better position than they would have been had no such exceptions been made: "[t]he statute plainly singles out supervisory goodwill for special treatment, *albeit treatment less harsh than other forms of intangible assets.*" App. 42a (emphasis added). The fact that transition rules in the statute granted respondents a partial exception from more generally applicable restrictions could not possibly mean that the restrictions themselves were not "public and general acts."

4. These cases warrant review by this Court because they involve the important legal principles discussed above, which will govern the result in approximately 100 other pending cases. The issues raised here are present in cases pending in the Ninth Circuit and in at least three district courts,[11] as well as in more than 90 cases currently stayed in the Court of Federal Claims awaiting a ruling here. The pending cases involve thrifts that booked goodwill totalling more than $8.5 billion and capital credits totalling more than $1.5 billion.

In addition, the Federal Circuit has refused to apply the unmistakability doctrine in other federal contract contexts. See *Hughes Communications Galaxy, Inc.* v. *United States*, 998 F.2d 953, 958 (Fed. Cir. 1993). At the same time, the doctrine is being used by other

[11] *Trinity Ventures* v. *FDIC*, Nos. 92-35597, 92-36535 (9th Cir.); *RTC* v. *Gravee*, No. 94 C 4589 (N.D. Ill.); *FDIC* v. *Maco Bancorp*, No. 94-1923 (D.D.C.); *FDIC* v. *First Heights Bank, FSB*, No. 95-72722-DT (E.D. Mich.).

circuits in varying circumstances to deny claims of contract rights against the government. See, *e.g.*, *Education Assistance Corp.* v. *Cavazos*, 902 F.2d 617, 629 (8th Cir.), cert. denied, 498 U.S. 896 (1990) (applying doctrine to changes in rules governing student loan program); *Western Fuels-Utah, Inc.* v. *Lujan*, 895 F.2d 780, 789 (D.C. Cir.), cert. denied, 498 U.S. 811 (1990) (applying doctrine to mining lease claims). Further review is warranted to clarify the circumstances under which the unmistakability doctrine applies.

Finally, the fact that these cases were before the Federal Circuit on an interlocutory appeal does not detract from the appropriateness of review by this Court now. Unless the legal rulings by the Federal Circuit are reversed, these cases will move forward to trials regarding damages; presumably, the more than 90 other cases in the Court of Federal Claims will also proceed to trial. Determining the proper measure of damages will be an extremely complicated, expensive, and time-consuming matter because the parties have very different views on this issue and the circumstances of each thrift vary greatly. Thus, the further proceedings in the trial court will require massive and expensive discovery and trials. That expense and the considerable drain on scarce judicial resources may be saved if these cases are reviewed now by this Court on the liability issues. No further factual record is necessary since the trials to be held in these three cases will focus solely on the measure of damages.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General

DOUGLAS LETTER
JACOB M. LEWIS
SCOTT R. MCINTOSH
Attorneys

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